

1 THE HONORABLE JAMES L. ROBART
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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 MICROSOFT CORPORATION,

10 Plaintiff,

11 vs.

12 MOTOROLA, INC., at al.,

13 Defendants.

14 Case No. C10-1823-JLR

15 NON-PARTY QUALCOMM
16 INCORPORATED'S MOTION TO SEAL
17 DOCUMENTS

18 NOTE ON MOTION CALENDAR:
19 Friday, November 23, 2012

20 Without Oral Argument

21 **Introduction and Relief Requested**

22 Pursuant to Western District of Washington Civil Local Rule 5(g), non-
23 party Qualcomm, Incorporated, on behalf of itself and its wholly owned subsidiary
24 Qualcomm Atheros (collectively "Qualcomm"), submits this Motion to Seal Documents,
25 for the purpose of protecting certain confidential documents and highly proprietary
26 information from public disclosure.

27 The seven documents that are the subject of this Motion, identified below,
28 were produced by both Microsoft and Motorola, not Qualcomm, and all seven have been
identified as potential trial exhibits by Motorola. Because these documents contain
sensitive and confidential Qualcomm business information, as shown below and in the

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1 supporting Declarations of Fabian Gonell and Adam Tachner, “compelling reasons” to
 2 seal those documents, along with any testimony on, summaries of, or other documents
 3 derived from the confidential information contained in those documents, outweigh any
 4 public interest in disclosing them. Qualcomm therefore submits this Motion to Seal.

5 **Factual Background**

6 During discovery in this matter, Motorola produced six patent licensing
 7 agreements between Motorola and Qualcomm (the “Qualcomm Licenses”) and Microsoft
 8 produced an Atheros Data Sheet for the AR8290 chip (the “Atheros Data Sheet”), each of
 9 which contains highly sensitive business information of Qualcomm. All six of the
 10 Qualcomm Licenses are designated as “Confidential Business Information, Attorneys’
 11 Eyes Only” and “Subject to Protective Order”, and the Atheros Data Sheet is designated
 12 as “Confidential Business Information” and “Subject to Protective Order”.

13 On October 24, 2012, Microsoft and Motorola jointly filed their list of
 14 proposed trial exhibits, which includes all six Qualcomm Licenses and the Atheros Data
 15 Sheet. (Dkt. 493-1.) The Qualcomm Licenses and Atheros Data Sheet for which
 16 Qualcomm seeks protection in this Motion are identified as follows¹:

- 17 • An Agreement to Amend the 1990 Patent License Agreement
 between Motorola and Qualcomm, labeled
 MOTM_WASH1823_0025476-488 and Defendants’ Trial Exhibit
 2809, and designated “Confidential Business Information” and
 “Attorneys’ Eyes Only”;

22 ¹ Motorola has sought to have this Court seal all of these documents. (Dkt. 495, at 8-
 11; Dkt. 495-1 (Exhibit A).) Microsoft agrees with Motorola that the Atheros Data Sheet
 23 should be sealed in its entirety. (Dkt. 533 at 6 n.2.) Qualcomm agrees with the
 24 arguments made in Motorola’s Motion, and believes that redaction is not feasible due to
 25 the extent and complexity of both the bargained-for consideration permeating the
 26 agreements and the technical information permeating the Atheros Data Sheet. But should
 the Court conclude that these documents should be redacted, Qualcomm requests the
 opportunity to provide redacted copies of these documents.

- 1 • An Amendment to DS-CDMA Technology Agreement between
2 Motorola and Qualcomm, labeled MOTM_WASH1823_0025409-
3 412 and Defendants' Trial Exhibit 3230, and designated
4 "Confidential Business Information" and "Attorneys' Eyes Only";
5
6 • An Agreement to Amend the Patent License Agreement and
7 Technology License Agreement and Software License Agreement
8 between Motorola and Qualcomm, labeled
9 MOTM_WASH1823_0025413-430 and Defendants' Trial Exhibit
10 3231, and designated "Confidential Business Information" and
11 "Attorneys' Eyes Only";
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13 • A DS-CDMA Technology Agreement between Qualcomm
14 and Motorola, labeled MOTM_WASH1823_0025431-467 and
15 Defendants' Trial Exhibit 3232, and designated "Confidential
16 Business Information" and "Attorneys' Eyes Only";
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18 • A Patent License Agreement between Motorola and Qualcomm,
19 labeled MOTM_WASH1823_0025489-502 and Defendants' Trial
20 Exhibit 3233, and designated "Confidential Business Information"
21 and "Attorneys' Eyes Only";
22
23 • A Draft of an Agreement to Amend the Patent License Agreement
24 between Motorola and Qualcomm, labeled
25 MOTM_WASH1823_0025468-475 and Defendants' Trial Exhibit
26 3234, and designated "Confidential Business Information" and
27 "Attorneys' Eyes Only"; and
28
29 • An Atheros Communications October 2008 Data Sheet for the
30 AR9280 Single-Chip 2x2 MIMO MAC/BB/Radio with PCI
31 Express Interface for 802.11n2.4 and 5 GHz WLANs, labeled MS-
32 MOTO_752_0001091439-592 and Defendants' Trial Exhibit 3343,
33 and designated "Confidential Business Information".

Qualcomm's business activities include licensing its patented technologies for use by participants in the mobile communications industry and developing chips for network communications, including wireless communications. Gonell Decl. at ¶ 2; Tachner Decl. at ¶ 2. As is well known, the mobile communications industry is both fiercely competitive and highly dynamic. The terms of licensing agreements for

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1 Qualcomm's mobile technologies are therefore heavily negotiated and reflect what are
 2 often very complex relationships between the parties. Gonell Decl. at ¶ 2. The terms of
 3 the Qualcomm Licenses, as is true of almost all Qualcomm licensing agreements, are
 4 subject to strict confidentiality obligations binding on both parties precisely because "the
 5 parties view these terms—which include financial terms as well as terms concerning
 6 other consideration, the nature and scope of rights granted, the length of the term,
 7 assignability, grounds for termination, and more—as trade secrets, the disclosure of
 8 which could place them at a disadvantage in their relations with competitors or other
 9 licensees or licensors". Gonell Decl. at ¶ 3.

10
 11 Of particular relevance here, the Qualcomm Licenses contain "highly
 12 confidential and sensitive financial terms unique to Qualcomm and Motorola and
 13 painstakingly negotiated over the course of a long-term commercial relationship,
 14 including royalty rates, royalty bases, royalty caps, and other financial terms". Gonell
 15 Decl. at ¶ 6. These terms disclose a careful balancing of value exchanged in the
 16 Qualcomm-Motorola relationship. Gonell Decl. at ¶ 6. The Qualcomm Licenses also
 17 contain "unique and painstakingly negotiated provisions under which Qualcomm receives
 18 rights to practice Motorola's patents", as well as "confidential, sensitive, and extensively
 19 negotiated provisions setting forth how and under what conditions the parties'
 20 intersecting rights under these long-term agreements may be terminated". Gonell Decl. at
 21 ¶¶ 7-8.

22 Qualcomm considers these confidential license terms to be trade secrets,
 23 and therefore goes to great lengths to protect these agreements—along with related
 24 correspondence, the specifics of negotiations, and other related documents—from public
 25 disclosure. Public disclosure of this information would inevitably and irretrievably result
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1 in it being obtained by Qualcomm's current and potential future competitors, customers,
 2 and other licensees, who would unfairly gain a strategic advantage over Qualcomm in
 3 licensing matters, including in future license negotiations. Consequently, public
 4 disclosure of this information would "impede the ability of Qualcomm to compete in the
 5 future in its markets" and "make it more difficult to negotiate other sensitive and complex
 6 agreements with Motorola and with other parties in the future". Gonell Decl. at ¶ 6; *see*
 7 *also id.* at ¶¶ 7-8 (noting the same).

8 The Atheros Data Sheet also contains highly sensitive and confidential
 9 Qualcomm information. Prior to its acquisition by Qualcomm in 2011, Atheros
 10 Communications, Inc. invested approximately \$120 million in 2008 in research and
 11 development, Tachner Decl. at ¶ 2 (noting also that Qualcomm invests well over \$2
 12 billion annually in research and development), with the result that Qualcomm Atheros
 13 produces highly complex and innovative chips, the design and operation of which are
 14 highly confidential. Qualcomm Atheros provides data sheets containing "a substantial
 15 amount of technical and highly confidential information about how each of our chipsets
 16 are designed and how they operate" to current and potential customers. Tachner Decl. at
 17 ¶ 3. Because Qualcomm considers this information to be a valuable trade secret, such
 18 data sheets are generally provided to third parties under strict non-disclosure agreements.
 19 Tachner Decl. at ¶ 3.

20 The Atheros Data Sheet listed in the parties' proposed trial exhibits itself
 21 contains "a substantial amount of technical and highly confidential information about the
 22 AR9280 chip. This includes information regarding the technical engineering and
 23 operation of the chip, including precise technical specifications regarding the manner
 24 through which the AR9280 chip provides wireless communication capabilities." Tachner
 25 Decl. at ¶ 4. This information "could be used by a competitor or customer of Qualcomm
 26 Atheros to build a chip matching the features and functionality of the AR9280 chip. As a

1 result, this information would be highly valuable in the possession of customers and
 2 competitors of Qualcomm Atheros.” Tachner Decl. at ¶ 5. “It would therefore impede
 3 the ability of Qualcomm Atheros to compete in the future in its markets if its competitors
 4 and current and potential customers had such detailed knowledge of the design and
 5 operation of the AR9280 chip.” Tachner Decl. at ¶ 5.

6 **Argument: Qualcomm’s confidential documents should be sealed.**

7 Notwithstanding the public interest in open court proceedings, the
 8 Supreme Court has recognized the need to protect certain information from public
 9 disclosure, in particular when “court files might [] become a vehicle for improper
 10 purposes”. *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978). Courts are not
 11 to be “sources of business information that might harm a litigant’s competitive standing”.
 12 *Id.* Rather, the Federal Rules of Civil Procedure expressly permit this Court to order that
 13 “a trade secret or other confidential research, development, or commercial information
 14 not be revealed or be revealed only in a specified way”. Fed. R. Civ. P. 26(c)(1)(G).

15 This Court may use this power to seal trial exhibits for “compelling
 16 reasons”. *See Kamakana v. City and Cnty of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir.
 17 2006); *In re Midland Nat’l Life Ins. Co. Annuity Sales Practices Litig.*, 686 F.3d 1115,
 18 1119 (9th Cir. 2012); Local Civil Rule 5(g)(2). “In general, ‘compelling reasons’ . . .
 19 exist when such ‘court files might have become a vehicle for improper purposes,’ such as
 20 the use of records to . . . release trade secrets.” *Kamakana*, 447 F.3d at 1178-79 (quoting
 21 *Nixon*, 435 U.S. at 598). In the Ninth Circuit, a “trade secret is a process or device for
 22 continuous use in the operation of the business” and “may consist of any formula, pattern,
 23 device or compilation of information which is used in one’s business, and which gives
 24 him an opportunity to obtain an advantage over competitors who do not know or use it”.
 25 *Clark v. Bunker*, 453 F.2d 1006, 1008-09 (9th Cir. 1972) (quotation marks omitted).

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Licensing agreements have been recognized as trade secrets, and courts have therefore found there are “compelling reasons” to seal them. *See, e.g., In re Electronic Arts, Inc.*, 298 Fed. Appx. 568, 569-70 (9th Cir. 2008) (sealing licensing information); *Powertech Technology, Inc. v. Tessera, Inc.*, 2012 WL 3283420, *9 (N.D. Cal. Aug. 10, 2012) (sealing licensing information); *Abaxis, Inc. v. Cepheid*, 2011 WL 6002522, *1 n. 1 (N.D. Cal. Nov. 3, 2011) (sealing term sheet of licensing negotiations). In fact, earlier in this action, this Court found “compelling reasons” to seal licensing agreements between Motorola and several non-parties. (Dkt. 187 at 3-5.) Courts have also found “compelling reasons” to seal confidential product information, such as source code. *See Clark*, 453 F.2d at 1009 (quoting *Restatement of Torts* § 757, cmt. b); *In re Elec. Arts*, 298 Fed. Appx. at 569-70; *Agency Solutions.Com, LLC v. TriZetto Group, Inc.*, 819 F. Supp. 2d 1001, 1017 (E.D. Cal. 2011) (“[S]ource code is undoubt[edly] a trade secret.”).

Under this case law, the documents Qualcomm seeks to seal contain trade secrets, and there are therefore “compelling reasons” to seal them that outweigh any public interest in disclosing them. In fact, perhaps the most compelling reason of all is that the *primary* segment of the “public” likely to have an interest in accessing this information contained in these Qualcomm documents consists of Qualcomm’s competitors and customers, seeking it only for the “improper purpose” of enhancing their own “competitive standing” against Qualcomm, either by entering licensing negotiations armed with the knowledge of specific terms under which Qualcomm has agreed to license its intellectual property in the past, or by gaining unfair visibility into the architecture of Qualcomm Atheros chips which Qualcomm has spent vast sums developing. *See Nixon*, 435 U.S. at 598; *Kamakana*, 447 F.3d at 1179. Consequently, Qualcomm will be greatly prejudiced if its confidential information is not sealed—an

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1 injustice that is made greater still due to the fact that Qualcomm is a stranger to this
2 litigation and therefore an innocent third party.

3 Microsoft argues in its opposition to Motorola's motion to seal that only
4 the financial terms of licenses should be protected from disclosure. (Dkt. 533 at 2.) This
5 narrow and formalistic view of what trade secrets are contained in the Qualcomm
6 Licenses is divorced from economic reality. As Mr. Gonell's declaration demonstrates,
7 the Qualcomm Licenses memorialize a broad exchange of values between the parties, as
8 embodied in heavily negotiated non-financial terms providing Qualcomm rights to
9 practice Motorola's patents, Gonell Decl. at ¶ 7, and setting forth how and under what
10 conditions the parties' intersecting rights under these long-term agreements may be
11 terminated, Gonell Decl. at ¶ 8.

12 Because public disclosure of other aspects of the consideration exchanged
13 with Motorola in the Qualcomm Licenses would be no less injurious to Qualcomm's
14 competitive standing than disclosure of financial terms and is of no genuine public
15 interest, the compelling reasons rationale applies with equal force to sealing these terms
16 as it does to payment and royalty information.

17 As a result, the highly sensitive Qualcomm Licenses and Atheros Data
18 Sheet should be sealed, as should any other testimony on, summaries of, or other
19 documents derived from the confidential information contained in those documents. In
20 the event the Court concludes that these documents should be redacted rather than sealed,
21 however, Qualcomm requests the opportunity to provide redacted copies of each of the
22 documents at issue in this Motion.

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Conclusion

For the reasons stated above, this Court should grant Qualcomm's Motion to Seal Documents.

DATED this 10th day of November, 2012.

/s/ Christopher B. Durbin

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2 **Certificate of Service**
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4 I hereby certify that on November 10, 2012, I electronically filed the
5 foregoing with the Clerk of the Court using the CM/ECF system which will send
6 notification to all registered parties in this case.

7 DATED this 10th day of November, 2012, in Seattle, Washington.
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9 */s/ Christopher B. Durbin*
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